

BEFORE NANCY KEENAN, SUPERINTENDENT OF PUBLIC INSTRUCTION
STATE OF MONTANA

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BOARD OF TRUSTEES, DARBY SCHOOL
DISTRICT NO. 9,

Appellant,

VS.

WILLIAM MOLENDAS,

Respondent.

OSPI 218-93

DECISION AND ORDER

* * * * *

PROCEDURAL HISTORY AND FACTS OF THIS APPEAL

The Trustees of Darby School District No. 9 [hereinafter "the Darby Trustees" or "the District"] are appealing the November 30, 1992, decision of Acting Ravalli County Superintendent of Schools, Greg Danelz. The County Superintendent determined that William Molenda was entitled to severance pay of \$7,661 and, at his direction, payment was to be made to Option I of the Montana Teachers' Retirement System [hereinafter "TRS"].

Molenda was a teacher in District No. 9 for 18 years and a member of the Darby Federation of Teachers/Montana Federation of Teachers/American Federation of Teachers [hereinafter the "DFT"]. For a number of years the DFT and District No. 9 have had a collectively bargained agreement [hereinafter "CBA"]. Molenda resigned at the end of the 1987-88 school year when he was 46. In 1992, when he was 50, he was entitled to and applied for

1 Teacher's retirement benefits.

2 Different CBAs governed the terms of employment between the
3 teachers and District No. 9 in school year 1987-88 and 1991-92.

4 Article VII of the 1987-89 CBA stated:

5 B. Severance Pay -- Upon retirement from the Darby
6 system, the teacher shall be entitled to the unused
7 portion of their sick leave pay, not to exceed the
8 maximum allowable accumulative sick leave. Retirement
9 shall mean those persons who will, upon leaving the
10 Darby School System, then participate or receive
11 benefits under a retirement system.

12 In the 1990-92 CBA, the following language was added:

13 Section 1. Severance pay will not be allowed if Option
14 I of the Montana Teachers' Retirement System is
15 selected by the retiring teacher.

16 When Molenda left teaching in 1988 he had accumulated 65
17 unused sick days that was the equivalent of \$7,661 in wages. He
18 took no action concerning payment at that time. In June, 1992,
19 Molenda applied for his retirement benefits. Prior to that date
20 he contacted TRS about his retirement benefits. In March, 1992,
21 after contacting TRS, he requested \$7,661 severance pay from the
22 District and asked that it be applied to Option 1, TRS. The
23 District refused.

24 Although the 1987-89 CBA stated that the parties may take a
25 CBA issue to arbitration (See 87-89 CBA, Respondent's Exhibit K,
page 11), arbitration was not mandatory and neither party sought
arbitration. Instead, Molenda appealed the District's decision
to the County Superintendent and the District accepted that
forum.

1 The prehearing order states the legal questions raised by
2 the parties:

3 6. Issues of Law: The following issues of law, and no
4 others, remain to be litigated upon the hearing of this matter:

5 A. Which contract provisions should govern this
6 dispute, those contained in the 1987-88 Labor Agreement
7 or those contained in the 1990-92 Labor Agreement?

8 It is understood by the parties that this issue will be
9 dealt with before, during or in briefs following, the
10 hearing.

11 B. Is Petitioner entitled to severance pay
12 representative of his accumulated sick leave with
13 Respondent school district?

14 C. If the hearing officer finds for Petitioner in 6. B.
15 above, under what conditions and to what extent is
16 petitioner entitled to receive and/or assign said
17 severance pay?

18 'rehearing Order, pages 2 and 3.

19 The parties also stipulated to eight facts that are stated
20 is the first eight findings of fact of the order on appeal.

21 A hearing was held on October 21, 1992. On November 30,
22 1992, the County Superintendent issued his order. He concluded
23 :hat:

24 1. The 1987-89 CBA governs this dispute. (Order p. 7,
25 COL 2)

2. William Molenda is entitled to severance pay
representative of his accumulated sick leave. (Order p.
8, COL 3)

3. Mr. Molenda is entitled to apply the accumulated
severance pay to Option I of TRS. (Order p. 8, COL 4)

1 The District appealed on the basis that:

2 The Findings of Fact, as found by the Acting County
3 Superintendent in this matter, are clearly erroneous and the
4 County Superintendent abused his discretion in issuing the
5 conclusions of law in this matter. Harris v. Bauer, 230
6 Mont. 207, 749 P.2d 1068, at 1071, 45 St. Rptr. 147 at 151
7 (1988); City of Billings v. Billings Firefighters, 200 Mont.
8 421 at 430, 651 P.2d 627 at 632 (1982).

9 Notice of Appeal, page 1.

10 STANDARD OF REVIEW

11 This Superintendent's review of a County superintendent's
12 decision is based on the standard of review of administrative
13 decisions established by the Montana Legislature in § 2-4-704,
14 MCA, and adopted by this Superintendent in § 10.6.125, ARM.
15 Findings of fact are reviewed under a clearly erroneous standard
16 and conclusions of law are reviewed under an abuse of discretion
17 standard. Harris v. Trustees, Cascade County and Nancy Keenan,
18 241 Mont. 272, 731 P.2d 1318 (1990). The petitioner bears the
19 burden of showing that he has been prejudiced by a clearly
20 erroneous ruling. Terry v. Board of Reagents, 220 Mont. 214, at
21 217, 714 P.2d 151, at 153 (1986).

22 The State Superintendent may not substitute her judgment for
23 that of a County Superintendent as to the weight of the evidence
24 on questions of a fact. Findings are upheld if supported by
25 substantial, credible evidence in the record. A finding is
clearly erroneous only if a "review of the record leaves the
Court with the definite and firm conviction that a mistake has
been committed." Wage Appeal v. Board of Personnel Appeals, 208

1 Mont. 33, at 40, 676 P.2d 194, at 198 (1984).

2 The abuse of discretion standard for conclusions of law is
3 a more stringent review. Conclusions of law are reviewed to
4 determine if the agency's interpretation of the law is correct.
5 Steer, Inc. v. Dept. of Revenue, 245 Mont. 470, at 474, 803 P.2d
6 at 603 (1990).

7 DECISION AND ORDER

8 Substantial, credible evidence supports the County
9 Superintendent's findings and the conclusions of law are correct
10 as a matter of law. The decision of the County Superintendent is
11 AFFIRMED.

12 MEMORANDUM OPINION

13 A. Summary of the Parties' Positions. On appeal, the
14 Darby Trustees argue that the evidence does not support the
15 County Superintendent's findings and his conclusions of law are
16 an abuse of discretion. Molenda responds that substantial,
17 credible evidence supports the order and it is correct as a
18 matter of law.

19 The parties agree the 1987-89 contract language means a
20 teacher who retired in 1988 was entitled to receive as severance
21 pay the wage equivalent of unused sick leave and there was
22 testimony to that effect. (Transcript, p. 18) The parties
23 appear to agree the 1987-89 CBA did not preclude a teacher who
24 received accumulated sick leave as severance pay in 1988 from
25 applying it to Option I of the Montana TRS. And, they agree that

1 the 1990-92 CBA does specifically preclude a teacher from
2 applying severance pay to option 1 of TRS.

3 The dispute between the parties focuses on two points. One,
4 which CBA -- the 1987-89 or the 1990-92 -- applies. Two, what
5 the parties to the 1987-89 CBA meant by the "Retirement shall
6 mean . . ." language.

7 Concerning which CBA applies, the Darby Trustees argue that
8 Yolenda had no right to severance pay but, if he did have a right
9 to severance pay, the terms of the 1990-92 CBA control. This
10 would prevent Molenda from applying the severance pay to Option
11 1 of TRS. Molenda argues that the 1990-92 CBA is irrelevant to
12 him. His right to receive severance pay under the 1987-89 CBA
13 vested in 1988 and only the subsequent act of teaching in another
14 district, which did not occur, could divest him of that right.
15 The fact that in 1992 he exercised a right that vested in 1988
16 does not make the 1990-92 CBA applicable.

17 Concerning the meaning of the 1987-89 CBA language, the
18 Darby Trustees argue the "Retirement means . . ." phrase meant a
19 teacher who left District No. 9 had to immediately participate in
20 TRS to collect sick leave as severance pay. Molenda argues it
21 meant a person who left District No. 9 had to eventually
22 participate in TRS without working for another district to
23 collect the severance pay. He argues that neither the plain
24 language nor the intent of the contract imposes any requirement
25 that a teacher immediately participate in TRS.

1 B. Conclusions of the County Superintendent.

2 1. The County Superintendent's conclusion that the 1987-89
3 CBA governed this dispute is correct.

4 The Darby Trustees cited no legal authority to the County
5 Superintendent in support of their argument that the language of
6 the 1990-92 CBA governs this dispute. On appeal, the Darby
7 Trustees cite authority for the argument that "The entitlements
8 established by collective bargaining agreements do not survive
9 their expiration or modification," in Merk v. Jewell Companies,
10 Inc., 848 F.2d 761 (7th Cir.), cert. denied, 109 S. Ct. 393
11 (1988).

12 Appellant's Reply Brief, page 15.

13 For example, a CBA can entitle employees to three weeks
14 vacation during the term of that agreement but a later CBA can
15 modify that entitlement to one. While true, this principle does
16 not establish that, as a matter of law, the 1990-92 CBA controls
17 in this case. Molenda is not arguing to enforce a right that
18 expired; he argues to enforce a right that vested.

19 The County Superintendent concluded the right to severance
20 pay vested and applied the language of the 1987-89 CBA to this
21 dispute based on Kulins v. Malco, A Microdot Co., Inc., 459
22 F.2d 1038 (Ill.App. 1 Dist. 1984). In Kulins, the issue was
23 whether the terms of a 1967 or 1975 CBA governed severance pay.
24 The Court wrote:

25 The doctrine of promissory estoppel offers further
 support to our conclusion that severance pay, as a form

1 of deferred compensation. is an accrued or vested
2 right, incapable of retroactive modification.
3 Promissory estoppel, an equitable device invoked to
4 prevent a person from being injured by a change in
5 position made in reasonable reliance on another's
6 conduct, is comprised of the following elements: (1)
7 a promise (2) which the promisor should reasonably
8 expect to induce action or forbearance of a definite
9 and substantial character on the part of the promisee,
10 (3) which induces such action or forbearance, and (4)
11 which must be enforced in order to avoid injustice.
12 (Cites omitted, emphasis added)

13 Kulins, 459 N.E.2d at 1045.

14 In 1988 Molenda had performed his contractual employment
15 duties to District No. 9 under the 1987-89 CBA. The contractual
16 duties District No. 9 owed him -- salary and employment benefits
17 -- were established at that time under the terms of the 1987-89
18 CBA. The 1990-92 CBA established the contractual rights and
19 duties of teachers and the District in 1991-92, not 1987-88.

20 The Court wrote:

21 Defendant argues that because the right to severance
22 pay benefits is contingent upon satisfaction of the
23 eligibility criteria, it cannot be vested. We disagree
24 and draw the distinction between the right to accrue
25 severance pay benefits which is contingent upon the
condition precedent of length of service, and the right
to receive payments which is contingent upon the
condition subsequent of termination within the terms of
the policy. Once the service condition is satisfied,
the benefit derived from that term of service is vested
and can be divested only by failure to satisfy the
eligibility provisions. In other words, those
provisions act only to divest a vested right; they do
not prevent vesting from occurring initially.
(Emphasis added.)

26 Kulins, 459 N.E.2d at 1044.

1 2. William Molenda is entitled to severance pay
2 representative of his accumulated sick leave. (Order p. 8, COL 3)

3 Both sides agree that the right to sick leave as severance
4 pay in this case is contractual -- the CBA controls whether or
5 not Molenda was entitled to accumulate sick leave as severance
6 pay. If the meaning of the CBA can be determined from its plain
7 language, there is no need to construe the meaning of the
8 contract. If the language is not clear, the intent of the
9 drafters controls. Intent is a question of fact that was the
10 subject of the October 20, 1992 hearing.

11 It is ironic that the plain meaning of a sentence that
12 begins "Retirement means. . ." could not be determined from the
13 language of the sentence but it is apparent from the hearing that
14 the DFT and District No. 9 gave the same words different meaning
15 and reasonable minds could disagree about what was meant by the
16 word "retirement."

17 The County Superintendent wrote:

18 Beyond the lack of any written specificity, Respondent
19 was unable to establish either a specific intent as to
20 an existing time limit which had to be abided by, or an
21 understood time limit.

22 county Superintendent's Order, COL 3, page 8.

23 Intent is a question of fact. While written as a conclusion
24 of law, the County Superintendent's determination of the intent
25 of the parties is a finding of fact and substantial, credible
26 testimony was offered in support of this finding.

1 Molenda's witnesses testified that a teacher who quit
2 District No. 9 in 1988 did not have to immediately qualify for
3 TRS benefits to be considered retired under the terms of the
4 contract or to have a contractual right to retirement benefits.
5 Veryl Kosteczko, who negotiated on behalf of the DFT for several
6 years, testifies at pages 16-32 of the transcript concerning the
7 teachers understanding of entitlement to severance pay. She
8 testified that a person who left teaching was entitled to the
9 severance pay; there was no requirement that a person quit
10 teaching and immediately participate in TRS. (Tr., p. 29)

11 The Darby Trustees offered testimony to the contrary (Tr.,
12 pp. 30-32) but the County Superintendent found Molenda's
witnesses more compelling. This Superintendent will not
14 substitute her judgement for the trier of fact. See, for
15 example, Puget Sound Power & Light Co. v. Department of Revenue,
16 232 Mont. 314, 318, 761 P.2d 336 (1988).

17 3. William Molenda is entitled to apply the severance pay
18 to Option I of TRS. (Order D. 8. COL 4)

19 The testimony of the witnesses established that until 1992
20 it was agreed that teachers leaving District No. 9 could apply
21 their severance pay to Option I of TRS. (Tr., p. 31) The Darby
22 Trustees have not offered any legal arguments against this.

23 The same reasoning that supports the conclusion that the
24 1987-89 CBA applies to this dispute supports the conclusion that
25 Yolenda could apply the severance pay to Option 1. Molenda's

1 right to severance pay vested during the period he performed
2 services for the District under the terms of his contract. Upon
3 his resignation, the vesting period was complete subject to a
4 possible divesting if he had accepted a teaching position with
5 another district. Absent a statutory prohibition in Title 19,
6 MCA, which has not been raised, the County Superintendent was
7 correct to allow the severance pay to be credited to Option I.

8 C. New Issues on Appeal.

9 On appeal, the Darby Trustees made a valiant effort to raise
10 new issues and put additional facts into the record. They would
11 like this Superintendent to decide this case based on the
12 District's perception of the consequence of this decision in the
13 future. Future consequences are not a matter of record and,
14 unlike this case, the statute of limitations on a contract claim
15 may be a defense. In any case, this Superintendent's review is
16 based solely on the record created below on the issues raised
17 before the County Superintendent.

18 In Vita-Rich Dairy, Inc. v. Dept. of Business Regulation,
19 170 Mont. 341, 553 P.2d 980 (1976), the Montana Supreme Court
20 made it clear that review of decisions from administrative
21 hearings were just that -- review. Parties must make their best
22 case at the first level -- to the County Superintendent hearing
23 the evidence. If this Superintendent, or a Court, considers
24 additional evidence not in the record or considers issues not
25 raised below, the administrative process is weakened.

1 DATED this 12 day of October, 1993.

2
3 Nancy Keenan
4 NANCY KEENAN

5 CERTIFICATE OF SERVICE

6 THIS IS TO CERTIFY that on this 12th day of October, 1993,
7 a true and exact copy of the foregoing Decision and Order was
nailed, postage prepaid, to the following:

8 Janice Doggett
9 Staff Attorney
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